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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 715

ROBERT W. HICKS, *Petitioner*

v.

ARTHUR E. SUMMERFIELD, Postmaster General of the UNITED STATES, and PHILIP YOUNG, GEORGE M. MOORE and FREDERICK J. LAWTON, United States Civil Service Commission, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioner, Robert W. Hicks, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on November 13, 1958.

OPINIONS BELOW

The United States District Court for the District of Columbia rendered no opinion. The opinion of the Court of Appeals is not yet reported, but it is printed in the appendix to this petition (App., *infra*, pp. 1a-2a).

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1958 (App., *infra*, p. 3a). A timely petition for rehearing *in banc* was denied on December 17, 1958 (App., *infra*, p. 4a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I.

Whether the Civil Service Commission are indispensable parties defendant to an action brought by a member of the classified civil service for restoration to his federal employment where he was removed therefrom by the head of his employing agency at the direction of the Civil Service Commission, but in violation of the provisions of the Lloyd-LaFollette Act.

II.

Whether the Civil Service Commission by the mere device of directing the employing agency to remove a member of the classified civil service from his federal employment can thereby insinuate themselves as indispensable parties defendant to an action brought by such employee against the head of his employing agency for restoration of his employment on the ground

that his removal therefrom was contrary to the provisions of the Lloyd-LaFollette Act.

III.

Whether the head of a federal agency has the right and the power with or without the approval of the Civil Service Commission to restore to office a member of the classified Civil Service who has been removed from his employment by such agency head at the direction of the Civil Service Commission, but contrary to the Lloyd-LaFollette Act.

STATUTES AND REGULATIONS INVOLVED

Rev. Stat., section 388, 5 U.S.C. 361, providing as follows:

> "Establishment. There shall be at the seat of government an executive department to be known as the Post Office Department, and a Postmaster General, who shall be the head thereof, and who shall be appointed by the President, by and with the advice and consent of the Senate, and who may be removed in the same manner; and the term of the Postmaster General shall be for and during the term of the President by whom he is appointed, and for one month thereafter, unless sooner removed."

Rev. Stat., section 396, 5 U.S.C. 369, providing in pertinent part as follows:

> "Duties of Postmaster General. It shall be the duty of the Postmaster General:
>
> * * * * *
>
> "Ninth. To superintend generally the business of the department and execute all laws relative to the Postal Service."

Lloyd-LaFollette Act, 37 Stat. 555 (1912), as amended, 62 Stat. 354 (1948), 5 U.S.C. 652 (a), providing in pertinent part:

> "(a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person effected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 863 of this title, only if he so elects."

Section 9.101 of the Civil Service Rules and Regulations, providing in pertinent part:

> "Agency responsibility for separation or demotion of employees.
>
> (a) The employing agency shall remove, demote, or reassign to another position any employee in the competitive service whose conduct or capacity

is such that his removal, demotion, or reassignment will promote the efficiency of the service . . ."

Veterans Preference Act, 58 Stat. 390 (1944), as amended, 5 U.S.C. section 863 (1952), providing in pertinent part:

". . . after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends. . . ."

STATEMENT OF THE CASE

This action was filed by the petitioner on October 5, 1956 in the District Court seeking declaratory and injunctive relief to secure the restoration of his employment with the United States Post Office Department (R. 1). Jurisdiction of the District Court was invoked under Title 28, Sections 2201 and 2202 of the United States Code, and Title 11, Section 315 of the District of Columbia Code. Named as defendants were Arthur E. Summerfield, Postmaster General of the United States, and the then members of the United States Civil Service Commission, Philip Young, George M. Moore, and Frederick J. Lawton.

In his complaint the petitioner, who has been a Federal career employee for about twenty years, alleged that at all times material to the act and particularly on October 7, 1955, the date of his removal, he had been a member of the classified civil service of the

United States being at the time employed by the United States Post Office Department as an engineering draftsman (mechanical), Grade G. S. 818-7, earning a salary of $4,525.00 per annum.

As an exhibit to his complaint, the petitioner attached a copy of the "Notification of Personnel Action" dated October 7, 1955 by which the Post Office Department dismissed him for the following reasons:

> "For false and misleading statements in your Civil Service papers concerning separations from previous employments and experience, and other evidence of unsuitability for Government employment." (R. 5).

In setting forth the grounds for the relief he sought, petitioner alleged further in his complaint that his removal from office was improper and contrary to law in that it was in violation of the provisions of the Lloyd-LaFollette Act which he claimed were applicable to him and his employment.

Following the filing of their answer to the complaint, the respondents moved the District Court to dismiss the complaint on the ground that during the pendency of the suit the respondents George M. Moore and Philip Young had resigned from office, that the petitioner had failed to substitute as parties their successors in office, and that such successors were indispensable parties to the suit.

After the hearing on the motion, the District Court entered an Order on March 19, 1958 granting the defendant's motion and dismissing the complaint without findings or opinion (R. 13).

On appeal to the Court of Appeals it was conceded that the Civil Service Commission had directed petitioner's removal and that Court concluded that "under the circumstances of this case the Civil Service Commissioners were indispensable parties to the suit" and affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. By its decision in this case, the Court of Appeals has established the District of Columbia, which is the only jurisdiction where service of process can be made upon the members of the Civil Service Commission, as the sole forum for all Federal employees having grievances similar to those of the petitioner. And this is true without regard to whether or not the Federal employee wishing to assert a legal right is a resident of or employed in the District of Columbia. Without venturing the number of Federal employees resident throughout the 49 states, they constitute a vast assemblage for many of whom it would be vexatious, if not impossible, to conduct their litigation in the District of Columbia where the Court of Appeals has said it must be conducted. In consequence, the litigant of modest means who by chance lives beyond the District of Columbia is as a practical matter deprived of his fundamental right to seek a judicial remedy.

2. Affecting as it does all classified civil servants of the Federal Government, it seems apparent that the ruling of the Court of Appeals needs more than an expression of law predicated on "the circumstances of this case." Certainly the ruling because of its importance should be clarified and elaborated upon for the guidance of litigants in future cases. It is submitted that in citing *Blackmar* v. *Guerre*, 342 U.S. 512 (1952),

and *Benenati* v. *Young*, 95 U.S. App. D.C. 120, 220 F. 2d 383 (1955), as sufficiently analogous to lend some support to the text of its opinion, the Court of Appeals only served to develop further the uncertainty surrounding the questions involved. *Blackmar* dealt with Section 14 of the Veterans Preference Act of 1944, as amended, (5 U.S.C. 863) which expressly gives to the Civil Service Commission the absolute right to direct that the employing agency remove the employee. In view of this peculiar statutory authority it is clear that the members of the Civil Service Commission are indispensable parties to a suit brought under that Act.

In *Benenati* the decision was *per curiam* and the facts recited by the Court do not tell us the statutory basis for the discharge concerning which the employee there complained. It is noted, however, that in that case this Court cited *Blackmar* and it is accordingly assumed that the Civil Service Commission in *Benenati* acted under a statutory power making its findings mandatory upon the employing agency. In any event, the Court concluded in *Benenati* that there was statutory compliance from which the decision followed that the dismissal ordered by the District Court was correct. In that posture the question of the indispensability of the members of the Civil Service Commission was rendered nugatory.

In the case at bar, however, the petitioner made no claim that he was a preference eligible. He asserted no entitlement to relief under 5 U.S.C. 863. Rather, he relied solely on the Lloyd-LaFollette Act, 5 U.S.C. 652(a), looking for an implementation of the procedural safeguards that this latter Act contains and for

the fulfillment of which only the employing agency is responsible. As the petitioner contended in the District Court and in the Court of Appeals, since the Civil Service Commission is neither conferred with any power nor charged with any duties under the Lloyd-LaFollette Act, it is the head of the employing agency and only he who is necessary to afford the relief prayed for.

3. In holding that the Civil Service Commissioners were indispensable parties to the petitioner's suit, the Court of Appeals wrote into the Lloyd-LaFollette Act a directive to the Civil Service Commission which the Congress itself did not see fit to include. If the Congress believed a Government employee to be amply protected by requiring only that the employing agency be held to account for the procedural safeguards found in the Lloyd-LaFollette Act, then it was not for the Court of Appeals to go beyond the conclusions of the legislature. Obviously the Congress thought it enough that the employing agency alone should be held to respond to the provisions of the Act; if the Congress had thought otherwise, then it may be assumed it would have, as it did in the Veterans Preference Act of 1944, as amended, give to the Civil Service Commission the authority it claims to have.

Nor, it is submitted, did the Congress intend that by the expedient of directing the removal of a classified civil servant in violation of the Lloyd-LaFollette Act the Civil Service Commission could in such manner insinuate itself into a situation where it did not belong. It seems a compelling conclusion that even though a removal is at the direction of the Civil Service Commission it is still the employing agency which

must abide the terms of the Lloyd-LaFollette Act and failing that to restore the employee to office.

In *Williams* v. *Fanning,* 332 U.S. 490 (1947), this Court held in an injunction suit brought against a local postmaster who was enforcing a fraud order of the Postmaster General that a decree against the local postmaster would effectively grant the relief desired for the reason that if he desisted from the acts complained of the matter would be at an end without requiring the Postmaster General "to do a single thing." Likewise, in this case a decree requiring the respondent Summerfield to restore the petitioner to his employment would effectively grant the relief desired for nothing is required of the Civil Service Commission. It is the Postmaster General who is the head of the Post Office Department (5 U.S.C. 361); it is he who is responsible for superintending the business of the Department (5 U.S.C. 369); and it is he who has the power to determine the qualifications of applicants for and the competency of holders of positions in the Department (*Keim* v. *United States,* 177 U.S. 290). And this power of the employing agency is given credence in the Civil Service Regulations themselves which at Section 9.101 provide:

> "The employing agency shall remove, demote, or reassign to another position any employee in the competitive service whose conduct or capacity is such that his removal, demotion, or reassignment will promote the efficiency of the service. . . ."

Therefore, a decree against the Civil Service Commission in this case would by implication invest them with a power they do not have and which is reserved to the Department head.

4. Standing alone the judgment of the Court of Appeals imposes an intolerable burden upon many Government employees to litigate their grievances in a jurisdiction foreign to both their residence and their place of employment. Read with the case of *Schwartz* v. *Mathias*, 235 F. 2d 620 (3rd Cir. 1956), it creates a conflict between the circuits which only this Court can resolve. In *Schwartz* the dismissal like in this case emanated from the Post Office Department on the basis of what was apparently the direction of the Security Hearing Board and there the Third Circuit held:

> "An order directed to the Security Hearing Board would be ineffectual to effect Schwartz's reinstatement since it was the Postmaster General, and not the Hearing Board, who dismissed Schwartz and only the Postmaster General can reinstate him."

If an order directed to the Security Hearing Board in *Schwartz* would have been ineffectual, then to the same extent would an order against the Civil Service Commission be ineffectual in the case at bar.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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